

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----X  
4 UNITED STATES OF AMERICA,

5  
6 -against-

7  
8 VIRGIL RIVERS,

9  
10 Defendant.  
11 -----X

**MEMORANDUM AND ORDER**  
03-CR-01120 (FB)

12 *Appearances:*

13 *For the Government:*

14 LORETTA E. LYNCH, ESQ.  
15 United States Attorney  
16 DAVID CAREY WOLL, ESQ.  
17 United States Attorneys Office  
18 Criminal Division  
19 271 Cadman Plaza East  
20 Brooklyn, NY 11201  
21

*For the Defendant:*

VIRGIL RIVERS, *pro se*  
#81378-158  
Unit: DA  
P.O. Box 26032  
Beaumont, TX 77720

22 **BLOCK, Senior District Judge:**

23 Virgil Rivers (“Rivers”) moves, *pro se*, to dismiss the indictment upon which  
24 he was convicted and sentenced. He argues that, because the first page of the  
25 superceding indictment contained an error—by listing the wrong section of the United  
26 States Code on the first page, but not the second—the entire indictment was defective  
27 and deprived the Court of subject matter jurisdiction.

28 **I**

29 An indictment must “be a plain, concise, and definite written statement of the  
30 essential facts constituting the offense charged.” FED. R. CRIM. P. (7)(c)(1). The rule

1 is satisfied so long as the indictment “contains the elements of the offense charged and  
2 fairly informs a defendant of the charge against which he must defend.” *Hamling v.*  
3 *United States*, 418 U.S. 87, 117 (1974). An error in the citation of law that the  
4 defendant is alleged to have violated is not a ground to dismiss an indictment or  
5 reverse a conviction “[u]nless the defendant was misled and thereby prejudiced.”  
6 FED. R. CRIM. P. 7(c)(2).

7 The most recent Second Circuit authority that addresses this uncommon  
8 argument is nearly 40 years old, and holds that, “if an indictment properly charges an  
9 offense, it is sufficient, even though an inapposite statute is referred to therein.”  
10 *United States v. Eucker*, 532 F.2d 249, 257 (2d Cir. 1976); *see also United States v.*  
11 *Calabro*, 467 F.2d 973, 981 (2d Cir. 1972) (“The fact that the wrong section of the  
12 statute was cited does not invalidate either the charge . . . if, as here, no prejudice is  
13 shown to derive from the miscitation.”).

14 The Seventh Circuit has a less dated opinion that considered a similar issue. In  
15 *United States v. Bjorkman*, 270 F.3d 482 (7th Cir. 2001), the court relied on *Neder v.*  
16 *United States*, 527 U.S. 1 (1999), which held that a conviction may be affirmed under  
17 harmless-error analysis if an indictment omitted a harmless element of the crime  
18 charged. *See Neder*, 527 U.S. at 15. Building on *Neder*, the *Bjorkman* court reasoned  
19 that just as “deficiencies that make a [civil] complaint dismissable under FED. R. CIV.

1 P. 12(b)(6) do not deprive a court of jurisdiction . . . unless the complaint is frivolous,  
2 so errors in a non-frivolous indictment do not strip the district court of jurisdiction  
3 under [18 U.S.C.] §3231.” 270 F.3d at 490. Thus, “district judges *always* have  
4 subject-matter jurisdiction based on *any* indictment purporting to charge a violation  
5 of federal criminal law.” *Id.* (emphasis in original).

6 Under *Eucker* and *Calabro*, and the persuasive reasoning of *Bjorkman*, the error  
7 on page one of Rivers’s indictment did not deprive the Court of subject matter  
8 jurisdiction. Properly assessed, the non-frivolous indictment contained a typographical  
9 error that was corrected on its second page, and it included specific overt acts that  
10 Rivers took in furtherance of the conspiracy to commit bank robbery. *See* Mem. &  
11 Order, *United States v. Virgil Rivers*, Dkt. No. 245, May 19, 2010. Accordingly, there  
12 is no merit to Rivers’s claim that he was “misled and thereby prejudiced” by the error.  
13 FED. R. CRIM. P. 7(c)(2).

## 14 II

15 For the reasons stated above, Rivers’s motion is **DENIED**.

16 **SO ORDERED.**

17 /S/ Frederic Block  
18 FREDERIC BLOCK  
19 Senior United States District Judge

20 Brooklyn, New York  
21 July 30, 2014